United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: October 31, 1996

TO : Gerald Kobell, Regional Director

Region 6

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: Beverly Enterprises-Pennsylvania 506-6060-5000 506-6070-5000

Case 6-CA-28130-(1-3) 512-5009-6700

This Section 8(a)(1) case was resubmitted regarding our prior conclusion that the Employer's civil defamation lawsuit filed against three Unions is baseless under <u>Bill</u> Johnson's Restaurants v. NLRB, 461 U.S. 731 (1983).

In an Advice Memorandum dated September 10, 1996, we authorized issuance of complaint alleging that the Employer unlawfully sued the Union for malicious defamation in the publication of fliers and radio statements in furtherance of its labor dispute with the Employer. As relevant here, we agreed with the Region that the lawsuit lacks a reasonable basis within the meaning of <u>Bill Johnson's</u>, and noted that the Employer, as state court plaintiff, has failed "to present the Board with evidence that shows his lawsuit raises genuine issues of material fact," i.e. prima facie evidence of each clause of action alleged.¹

In a September 30 position statement, the Employer contends that we ignored Pennsylvania defamation and libel law, and misinterpreted the Linn "malice" standard, and therefore the lawsuit has a reasonable basis. Specifically, it argues that the Union's publicized claim of substandard patient care is false, and such false claims regarding business misconduct are defamatory per se from which damages to business reputation are presumed.² Further, under Pennsylvania law, a jury must determine the "gist" and the falsity of a publication, i.e. the overall message conveyed considering the entire publication together with any innuendoes or implications therein.³ According to the

² <u>Clemente v. Espinosa</u>, 749 F.Supp. 672, 677-78 (E.D. Pa. 1990).

¹ 461 U.S. at 746 n.12.

³ McDermott v. Biddle, 674 A.2d 665, 668 (Pa. 1996).

Employer, the gist of the Union's publications conveyed the message that Beverly provides substandard health care and its patients are at risk. While the General Counsel may disagree with this characterization of the "gist" of any of the publications, a jury question is presented when a statement can have both a defamatory and non-defamatory meaning. Finally, the question of malice depends on the credibility of the individuals who researched and published the allegedly defamatory statements, focusing on the Union's "state of mind," and the only inference that can be drawn prior to discovery is recklessness, since the truth regarding the overall quality of Beverly health care is available through public records and industry sources. Thus, the Employer takes issue with our "apparent conclusion" that the Linn malice standard establishes an "anything goes" standard in labor cases "by using legal conclusions such as 'rhetoric' or 'hyperbole' or 'opinion,'" which may be justified in an election campaign context but not, as here, in a Union corporate campaign to force Beverly to change its policy of opposing unionization of its facilities.

We adhere to our prior conclusion that the Employer's lawsuit is baseless, even assuming that the "gist" of the Union publications was a false claim of substandard patient care which is defamatory per se under Pennsylvania law. Employer erroneously characterizes the context in which the publications were made as merely a broad corporate campaign against its unionization policies generally, and ignores the numerous specific alleged unfair labor practices at specific facilities in Pennsylvania, along with other ongoing litigation, protracted contract negotiations and the ULP strike. For purposes of determining whether statements are protected under federal labor law, the "gist" of the communications to the public must be determined narrowly since they are protected under Section 7 if they are "directly related to an ongoing labor dispute, so long as those communications are 'a part of and related to the ongoing labor dispute.'"4 Moreover, "[i]n the health care field patient welfare and working conditions are often 'inextricably intertwined,'" and therefore "[e]ven if a health care employee phrases a complaint about a situation

4 <u>Hacienda de Salud-Espanola</u>, 317 NLRB 962, 966 (1995), quoting <u>Allied Aviation Service Co. of New Jersey</u>, 248 NLRB 229, 231 (1980), enfd. 636 F.2d 1210 (3d Cir. 1980) (emphasis in original).

solely in terms of its effect on patient welfare, the employee is protected if the situation relates to a working condition." 5

As noted in our September 10 Advice Memorandum at 4, the statements in the Union's handbills and radio messages were clearly appeals to the public made in the context of a labor dispute, and are therefore protected by Section 7 unless they were "malicious" under Linn, i.e., made with knowledge or reckless disregard of their falsity. 6 Contrary to the Employer's contention, we believe our construction of Linn is correct, i.e. federal labor law tolerates "intemperate, abusive and inaccurate statements," even if they are "erroneous and defame one of the parties to the dispute," absent a showing of malice. All of the statements herein accuse the Employer of either violating various laws (allegations which the Region has found meritorious and issued complaint) or maintaining unsafe or unacceptable conditions for employees as well as patients in its nursing homes. At worst, these statements constitute hyperbole and expressions of opinion which cannot be knowingly false⁸ and, in any event, are "inextricably

⁵ NLRB v. Parr Lance Ambulance Service, 723 F.2d 575, 578 (7th Cir. 1983) (inadequate equipment can affect health care worker's ability to properly care for patients and, to that extent, affects both the patient's welfare and the employee's working conditions), citing Misericordia Hospital Medical Center v. NLRB, 623 F.2d 808, 811, 813 (2d Cir. 1980) (report listing "serious deficiencies in the quality of care at [the hospital]" protected where complaints relating to patient welfare also relate to things affecting the nurses' performance of their duties).

⁶ Linn v. Plant Guard Workers, 383 U.S. 53, 61, 65 (1966).

⁷ Id. at 60-61 (citations omitted). See also Letter Carriers v. Austin, 418 U.S. 264, 283 (1974) ("scab" and "traitor" held to be protected labor speech). Cf. Milkovich v. Lorain Journal Co., 497 U.S. 1, 18-20 (1990) (no wholesale exemption for anything that might be labeled "opinion" since expressions of "opinion" may often imply an assertion of objective fact which, if malice is required, are actionable only if plaintiff establishes knowing or reckless falsity, citing Philadelphia Newspapers v. Hepps, 475 U.S. 767, 776-78 (1986)).

intertwined" with the ongoing labor dispute regarding working conditions of health care employees whom the Union represents. Activity "that is otherwise proper does not lose its protected status simply because [it is] prejudicial to the employer." Therefore, we adhere to our prior conclusion that the Employer's defamation lawsuit is baseless as a matter of federal law governing statements made in the context of labor disputes.

B.J.K.

⁸ See Boxtree Restaurant & Hotel, 2-CA-27912, Advice Memorandum dated March 20, 1995, and Parc Fifty Five, 20-CA-24210, Advice Memorandum dated February 28, 1992 (statements that employers had broken various laws and/or building codes constituted opinions, not facts, and therefore were not malicious under Linn). See Automobile Club of Michigan, 231 NLRB 1179 n.1 (1977), and Allied Aviation Service Co. of New Jersey, 248 NLRB 229, 230-31 (1980) (vitriolic or sensitive statements made in context of appeal to third parties in labor dispute protected by Section 7).

⁹ NLRB v. Circle Bindery, 536 F.2d 447, 452 (1st Cir. 1976). The Region apparently has determined that the Union did not lose the protection of Section 7 by making any knowingly or recklessly false statements in the communications for which it is being sued, including specifically its allegation after conducting a safety survey of Employer facilities that the water was not hot enough to sanitize linens or to give patients warm baths.